Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURTOF THE UNITED STATES
October Term, 1998

ADVANCED MATERIALS, INCORPORATED
Petitioner,

v.

UNITED STATES OF AMERICA, WILLIAM H. REED, E.A. BURGESS, GARY BAZZELL, AND PHILIP RODGERS
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 10, 1998

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QUESTIONS PRESENTED

1) Whether the discretionary function exception shields the Defense Contract Audit Agency (DCAA) auditors from liability for their professional malpractice when DCAA policy required them to comply with professional auditing standards in performing their audit work?

2) Whether the Contract Disputes Act governing contract matters with the Federal Government is the exclusive remedy for actions in Government contracting, and if so, do the tribunal adjudicating Government contract law matters have jurisdiction over tort issues?

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Federal Torts Claim Act , 28 U.S.C. 2401(b) 15,16,17, 18,19

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit is reported at 136 F.3d 137. The opinion of the District Court is reported at 955 F. Supp. 58.

JURISDICTION

The judgment of the court of appeals denying rehearing was entered on September 10, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Contract Disputes Act of 1978, 41 U.S.C. 601 et. Seq., and the Federal Torts Claim Act, 28 U.S.C. 2401(b) and their implementing regulations are set forth in an appendix to the petition.

STATEMENT

On March 4, 1996, Advanced Materials, Inc. (AMI), filed an action in the United States District Court for the Eastern District of Louisiana. The suit alleged professional malpractice by the Defense Contract Audit Agency of the United States for preparing a negligent audit report. AMI invoked jurisdiction under the Federal Torts Claim Act. The District Court dismissed the action for lack of subject matter jurisdiction holding that the Contract Disputes Act provided for the exclusive remedy for government contractors.

An appeal was filed with the United States Court of Appeals for the Fifth Circuit that affirmed the decision of the District Court. A suggestion for rehearing en banc was denied on September 10, 1998 resulting in this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Petitioner's claim is one for professional malpractice by the Defense Contract Audit Agency (DCAA). There is no privity of contract between AMI and DCAA which would allow the jurisdiction of the Contract Disputes Act to provide a remedy. Additionally, the DCAA audit is not grounded in policy considerations but rather professional auditing standards according to the Generally Agreed to Accounting Principles. There is no misrepresentation exception under the FTCA to the DCAA's actions because the document was used over many months as a "working tool" by the auditors to determine the reasonableness, allocability and allowability of costs. The Contracting Officer relied on this report and allowed AMI to continue working with the DCAA over many months to influence the DCAA's findings. This tacit understanding between the parties elevated the DCAA audit report to more than a mere formality of a communication or misrepresentation. DCAA's negligent findings denied AMI

wages and costs they were promised during contract negotiations.

ARGUMENT

I. AMI'S CLAIMS ARE NOT FOUNDED IN CONTRACT, BUT RATHER IN TORT.

There is no privity of contract between Petitioner (hereafter referred to as AMI) and the Defense Contract Audit Agency (DCAA). The DCAA is an independent audit agency of the Department of Defense that audits contracts for the Government Procurement Agencies. Just as the Contracting Officer relies on his engineers for the design of nuclear weapons, the contracting officer must rely on the DCAA for auditing their contracts to ensure that the costs are allocable, allowable, and reasonable. Therefore, the relationship between AMI and DCAA can be characterized as one of an incidental beneficiary (Restatement, Second, Contracts δ 302).

II. THERE IS NO ALTERNATIVE REMEDY UNDER THE CONTRACT DISPUTES ACT

Contrary to the Government's contention that this suit is another attempt by AMI to circumvent the Contract Disputes Act (CDA), AMI contends that it has used the exclusive forums of the CDA for its contract claims. To date, AMI has lost only one of its contract cases before the ASBCA and its subsequent appeal to the Federal Circuit, while it has settled favorably three cases before the ASBCA in 1998 with the U.S. Government paying AMI over $94,000. AMI still has two cases pending before the U.S. Court of Claims on other contract matters. AMI has never contested that the Armed Services Board of Contract Appeals and the United States Court of Claims are the exclusive jurisdictions under the CDA for government contract cases. However, as the United States Court of Claims stated in Transcountry Packing Co., Inc. v. United States, 215 Ct. Cl. 390 (1978), "it does not have jurisdiction over tort claims". Likewise, the

Armed Services Board of Contract Appeals has found it also lacks jurisdiction over tort claims because of its exclusive jurisdiction vested by Congress (See Appeal of United Technologies Corp., ASBCA No. 85,890 (1995)).

However, because the Government asserted the defense of the "Limitation of Costs Clause," which precluded review of the DCAA's actions in Appeal of Advanced Materials, ASBCA No. 47014, AMI was left with no alternative but to choose this forum in which to attack the negligence of DCAA in preparing its audit report which caused the contracting officer to withdraw his conditional promise of funding due to DCAA's determination that the costs were not reasonable, allocable, and allowable. Without some forum to hold DCAA accountable for negligent actions, the DCAA will have unfettered discretion to disregard Generally Accepted Accounting Procedures as well as the well-settled law of government contracts without any recourse.

The Petitioner's case presents a simple negligence theory of malpractice by the Defense Contract Audit Agency. Petitioner (AMI) was damaged directly from negligent actions by the DCAA Auditors. In particular, one of the largest disallowed costs by DCAA ($14,200) was for the wages of the sole female executive of AMI. DCAA denied a substantial part of her wages after complete contract performance and some three years after the contract award. DCAA in its conclusion of findings on these wages did not review the proposal, the contract, nor conduct discussions with the Contracting Officer or Pricing Analysts. This disallowance was contrary to basic contract tenets and contract hornbook law and was suggested by the DCAA auditor to be fraudulent even though it was presented and negotiated to the Government during contract award and subsequent contract modifications. Fortunately for AMI, the Justice Department did not see the merits in DCAA's case and decided not to pursue the matter any further after the referral of fraud by DCAA.

This one example of gross negligence by DCAA was a significant factor in AMI's failure to recover its costs. In Advanced Materials, Inc. v. Perry, 108 F.3d 307 (Fed. Cir. 1997), the Court stated "four months later the contracting officer informed the company that he would not authorize additional funds without assurance from the Defense Contract Audit Agency (audit agency) that the additional costs were 'properly allocable and allowable'. The audit agency concluded that the costs were unreasonable." In Appeal of Advanced Materials, ASBCA No. 47014 (1995), the administrative judge in his decision stated "For lack of proof of any change in position or detrimental reliance, there was no consideration for the contracting officer's conditional offer to fund AMI's overrun if DCAA found the overrun costs to be reasonable, allocable, and allowable. In any event, DCAA did not find the costs to be reasonable, allocable and allowable (finding 10)." Both of these decisions highlighted the fact that the Contracting Officer agreed to fund the

overrun of AMI if the costs were found to be reasonable, allocable, and allowable by DCAA. However, the main reason for the contracting officer's failure to keep his promise to fund the overrun costs while after more than one year of negotiations had passed between the parties was his reliance on a negligent audit report created by DCAA. This report failed to follow both generally accepted accounting principles and the Defense Contract Audit Manual and amounts to professional malpractice.

In testimony before the Armed Services Board of Contract Appeals, the Contracting officer admitted under oath that he agreed to fund AMI's overrun if DCAA found the costs to be allowable and allocable to the contract (Appeal of Advanced Materials, ASBCA No. 47014, Decision Finding of Fact No. 10). However, when the costs were determined to be unreasonable by DCAA's auditor who had also simultaneously initiated an investigation for fraud, it was highly unlikely that the contracting officer would be willing

to risk his professional career in supporting a start-up defense contractor against the "professional opinion" of the Defense Contract Audit Agency. Nevertheless, this trust was misplaced when the contracting officer relied on the grossly negligent audit report. As of this writing, AMI still has been unable to find a single opinion in the voluminous decisions of Government contract law to support DCAA in its disallowance of a salary involving completed contract performance and numerous reviews by the Procurement Agency during negotiations and subsequent modifications to the contract. Additionally, the same DCAA auditor that disallowed the female's compensation refused to question or disallow two male subordinates' pay scale involving the same salary rate and lesser educational qualifications in management than the female employee in question.

III. THE ACTIONS OF THE DCAA ARE NOT BASED IN POLICY OR DISCRETIONARY FUNCTIONS AND ARE NOT SUBJECT TO ANY EXCEPTIONS UNDER THE FTCA.

In General Dynamics Corp v. United States, 139 F.3d 1280 (9th Cir. 1998), the Court while analyzing a DCAA audit malpractice case, found that the discretionary function exception for purposes of the Federal Torts Claim Act (FTCA)must be reviewed on a case by case basis with the inquiry as to each specific actor. In General Dynamics, the Court found that the Government was not liable for audit malpractice because the harm suffered by General Dynamics was not the result of the negligent audit report prepared by DCAA, but rather the discretionary exercise of the prosecutors function which is immune from tort liability. The dissent noted however, that the misconduct of DCAA is a different story. "Each separate action must be examined to determine whether the specific actor had discretion of a type Congress intended to shield." (General Dynamics at 20).

In the decision of the trial court in General Dynamics v. United States, CV 89-6762, the findings of fact concluded

that the DCAA actions were not discretionary in nature. The findings of fact at the trial level referred to depositions of William Reed the administrative head of the DCAA and stated, "the auditors professional judgment must be exercised in a manner that assures that he meets generally accepted auditing standards. While DCAA auditors exercise professional judgment, they do not make DCAA policy." These findings of fact at the trial level confirmed that there is no issue of discretionary function that would preclude FTCA jurisdiction.

Also, the Court in General Dynamics analyzed the case according to the exceptions to the FTCA rather than the exclusive subject matter jurisdiction of the Contracts Dispute Act. It can be surmised that since neither the Government nor General Dynamics brought up the exclusive jurisdiction of the Contracts Dispute Act as an issue in their appeal, that the parties and the Courts concluded the FTCA provided a

remedy distinct from the Contracts Dispute Act. However, this belief still premised jurisdiction on the Government's waiver of sovereign immunity unless there was a clearly carved out exception under the FTCA.

The Court of Appeals noted, however, that if the discretionary function exception is read to broadly it "could swallow up a large part of the FTCA itself (see General Dynmics at 5980,7). To distinguish the broad spectrum of the discretionary function exception, the Court in contrasting two cases stated "while Glacier Bay and Fischer Bros. Seem to be in healthy tension, they are not in opposition unless one or the other is read in an overly broad fashion. Glacier Bay seeks to avoid the problem of expanding the discretionary function exception to the point that it overcomes the purpose of the FTCA, while Fisher Bros. seeks to avoid shrinking the exception to a mere formality". It is exactly this contrast as elucidated by the Ninth Circuit Court of Appeals that defines the present case.

There is no question in Petitioner's case that the Contracting Officer relied on the audit report of DCAA to deny AMI additional funds. If in fact that audit report was negligently performed for the contracting officer by DCAA then DCAA should be held liable for professional malpractice. In AMI's claim for DCAA malpractice, neither of the actors (DCAA or the contracting officer) enjoy the discretionary function exception under the FTCA. DCAA is guided by its own Defense Contract Audit Manual as well as Generally Accepted Accounting Principles. The Contracting Officer is guided by Basic contract law and Procurement regulations. In United States v. Winstar Corp., 116 S. Ct. 2432 (1996), the Supreme Court reaffirmed that contractual, not regulatory principles control the interpretation and enforcement of federal government contracts, even those which provide specific regulatory treatment. Likewise, the Winstar holding limits the discretionary function exception for the actors involved in AMI's case. AMI believes that the "specific

actor" inquiry by the Ninth Circuit in General Dynamics' case easily distinguishes the present case from the General Dynamics attack on prosecutorial discretion.

IV. DCAA HAD A DUTY TO AMI UNDER LOUISIANA LAW

In First National Bank of Commerce v. Monco Agency, 911 F.2d 1053 (5th Cir. 1990), this court found a theory of accountant liability for malpractice to third parties whenever the accountant possesses knowledge that the third party will rely on the accountant's information. The present case is distinguishable from FNBC because the DCAA (accountant) conducted exit interviews with AMI regarding their findings and was involved in protracted discussions with AMI concerning AMI's dispute of the DCAA findings. The DCAA also possessed actual knowledge that the Contracting Officer would use the audit report as a tool to reach his conclusions of payment. This conduct is analogous to the

hydrographer's providing charts to the National Oceanic and Atmospheric Administration in the case of The Glacier Bay United Cook Inlet Drift Assoc. v. United States, 71 F.3d 1447 (9th Cir. 1995). As in Glacier Bay, there should be no exception for DCAA liability under the misrepresentation exception to the FTCA.

THE ACTIONS OF THE DCAA WERE THE SOLE AND PROXIMATE CAUSE OF INJURIES TO AMI

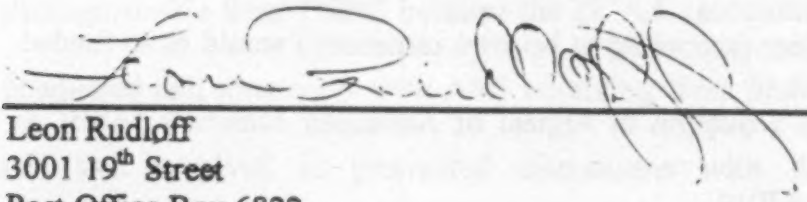
But for the DCAA negligent audit report, the Contracting Officer (according to his own testimony) would have funded AMI's overrun in Appeal of Advanced Materials, ASBCA No. 47014.

Conclusion

This case rests upon the sole premise of whether the Contract Disputes Act provides the exclusive remedy for any action

for damages under a government contract. Both the U.S. Court of Federal Claims and the Armed Services Board of Contract Appeals state they do not have such jurisdiction. The professional malpractice of a government agent not with privity of contract with Petitioner should fall within the jurisdiction of the FTCA. It is time to make the Government accountable for its actions when it enters into contracts with private parties. Because there is no applicable exception under the FTCA to the instant case, the Petitioner respectfully requests a reversal of the Appellate Court's decision.

Respectfully submitted,



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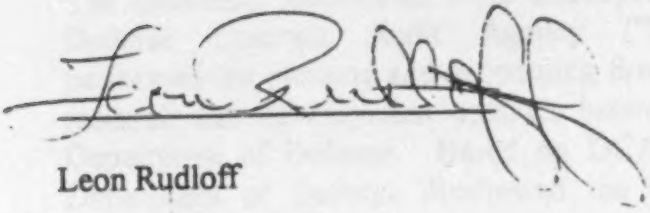
CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 1998, I caused Petitioner's brief to be served on the Solicitor General of the United States by United States Mail.



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-30403

(Summary Calendar)

ADVANCED MATERIALS, INC.,

Plaintiff-Appellant,

Versus

UNITED STATES OF AMERICA;
WILLIAM H. REED; E. A. BURGESS;
GARY BAZZELL; PHILLIP RIDGERS,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern district of Louisiana
(USDC No. 96-CV-771-I)

Before WEINER, BARKSDALE, AND EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

Advanced Materials, Inc. ("AMI") appeals the dismissal of its claims for lack of subject-matter jurisdiction. The individual defendants were employee auditors for the Defense Contract Audit Agency ("DCAA"), which performed the auditing and accounting functions regarding a research and development contract between AMI and the Department of Defense. Based on DCAA's analysis, the Department of Defense disallowed the reimbursement of contract costs to AMI.

AMI alleges that the individual defendants were negligent in auditing and analyzing AMI's contract and committed various acts as of libel or slander disparaging AMI. AMI has filed these claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Sections 1346 (b), 2671-80. The FTCA acts as a waiver of the United States' sovereign immunity from suit. However, the FTCA explicitly excluded any claims "arising out of . . . libel, slander, . . . or interference with contract rights. . . ." 28 U.S.C. Section 2680 (h). Although AMI has framed its claims in terms of negligence, the claims regarding contract analysis and auditing are clearly based in contract and cannot be considered tort claims for the purposes of FTCA. See Davis v. United States, 961 F.2d 53, 56 (5th Cir. 1991). As none of AMI's claims fall within the FTCA's waiver of sovereign immunity, the district court lacked subject-matter jurisdiction to consider them and properly dismissed the suit. See Truman v. United States, 26 F.3d 592, 594 (5th Cir. 1994).

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ADVANCED MATERIALS, INC.	CIVIL ACTION
VERSUS	NO. 94-2808
E.A. BURGESS AND GARY BAZZELL AND OTHER UNKNOWN AUDITORS	SECTION "D"

JUDGMENT

In light of the court's minute entry dated January 20, 1995,

IT IS ORDERED, ADJUDGED AND DECREED that the complaint filed by Advanced Paper, Inc. be and is hereby DISMISSED for lack of subject matter jurisdiction.

New Orleans, Louisiana on this 23 day of January, 1995.

UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
McNAMARA, J.
JANUARY 20, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ADVANCED MATERIALS, INC. CIVIL ACTION

VERSUS NO. 94-2808

E.A. BURGESS AND GARY BAZZELL SECTION "D"

Before the court is the Motion to Dismiss filed by defendants, E.A. Burgess and Gary Bazzell. Advanced Materials, Inc opposes the motion. This motion, which was set for hearing on January 18, 1995, is before the court on briefs, without oral argument.

BACKGROUND

This suit arises out of alleged violation of the plaintiff's constitutional rights by defendants, who are government employees. Plaintiff has had sever contracts with the Department of Defense, all related to research and development. This litigation is one of several which have arisen from that contractual relationship.

The regular procedure when government contracts are involved is that after the contract work is performed and the bills are paid, the government has its auditors audit and render an opinion on the allowability of costs on Government contracts. The opinions of the auditors are advisory, and may be accepted or rejected by the Contracting Officer, who makes a final determination of allowability. This final decision may result in the partial reimbursement of payments to the Government, due to overpayment on the contract.

In the instant litigation, the plaintiff had six government contracts which were audited by the defendants. In connection with those contracts, plaintiff filed what was characterized as a Mandamus action against the government in district court. Furthermore, plaintiff has pursued administrative remedies. The litigation at hand was filed against the auditors personally, alleging that they conspired to distort the truth, to tarnish plaintiff's reputation, and to force plaintiff out of business, in violation of plaintiff's due process rights.

The defendants filed this motion to Dismiss arguing that plaintiff's claim is a Bivens action against the auditors which is not permitted because of the existence of a comprehensive statutory scheme governing the relationship between plaintiff and defendants.

LEGAL ANALYSIS

In Bivens, the Supreme Court created a new remedy for persons deprived of their constitutional rights by federal employees. 403 U.S. at 396-97. In Carlson v. Green, 446 U.S. 14 (1980), the Court held that there are two instances in which the Bivens cause of action would be defeated: 1) when there were "special factors counseling hesitation in the absence of affirmative action by Congress," and 2) when "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." Id. At 18-19 (Citing Bivens, 403 U.S. at 396). In these two cases, no remedy would be available under the judicially enacted Bivens doctrine.

In Bush v. Lucas, 462 U.s. 367 (1983), the Court went one step further and held that it would be inappropriate to supplement a judicial remedy when Congress was more capable of addressing the problem. The thrust of the Lucas decision was the holding that if an existing remedial scheme was in place which addressed the problem raised in the Bivens claim then the Bivens claim would not be allowed.

Finally, in Schweiker v. Chilicky, 487 U.S. 412 (1988), plaintiffs claimed government officials had used impermissible quotas in denying their Social security benefits, in violation of their due process rights. The claimants' benefits were reinstated, but they sought consequential damages (which were not allowed under the statutory scheme) from the officials for alleged physical, emotional, and materials harms resulting from the delay in receiving benefits, and injury to their dignity from being labeled "cheats."

The court held that no Bivens remedy should be allowed even if there had been a constitutional violation, and the existing remedial scheme did not provide complete relief for the plaintiff. Id. At 423. The rationale was that when the design of a government program implied that congress considered that program to be an adequate remedial measure for all violations, including constitutional violations, additional Bivens remedies were not to be created. Id.

In the instant suit, plaintiff has sued federal employees individually for alleged violation of its constitutional rights, and it is thus a Bivens suit. In light of the Supreme Court's decisions, this suit is only permissible if no statutory remedy exists for potential harms, even if the applicable statutory remedy does not address constitutional violations.

The Contract Disputes Act of 1978, (CDA"), 41 U.S.C. Section 601 et seq "provides a comprehensive statutory system of remedies for resolving government contract disputes." United States v. McDonnell Douglas Corp., 751 F.2d 220, 223 (8th Cir. 1984). When the CDA was enacted, Congress intended to replace the prior uncoordinated practice and provide a "fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. Rep. No. 95-1118 at 1, 1978 U.S.C.C.A.N. 5253.

Under the CDA, disputes relating to a government contract must first be resolved by the government's

"contracting officer," whose decision can be appealed in accordance with the CDA. 41 U.S.C. Section 601 (3-5). While the CDA does not provide for a review in the district court, a contractor can seek review by appealing the decision to the agency board of contract appeals, and the decision is reviewable in the United States Court of Appeals for the Federal Circuit. 41 U.S.C. Section 606-608. Alternatively, a contractor can seek de novo review in the Court of Federal Claims. See 41 U.S.C. Section 609.

Because plaintiff's claims against defendants arise from its contractual relationship with the government, they are subject to regulation under the CDA. This comprehensive statutory remedial scheme precludes plaintiff from asserting a Bivens action founded upon its contract dispute with the government.

Consequently, this court lacks jurisdiction over the plaintiff's claims.

Accordingly,

IT IS ORDERED that defendants' Motion to Dismiss this matter be and is hereby GRANTED.